

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeals of
The Sherwin-Williams Company * **Docket Nos. MSBCA 3099, 3107, 3110**

Under *
Department of General Services *
Solicitation No. 001IT820838/ *
MDDGS31038816 *

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OPINION AND ORDER BY BOARD MEMBER KREIS

This Appeal came before the Maryland State Board of Contract Appeals (“Board”) for a hearing on the merits of The Sherwin-Williams Company’s (“SW” or “Appellant”) consolidated appeals on July 31, 2019 and September 11, 2019.¹ For the reasons set forth below, the Board denies the appeals.

¹ SW filed three separate appeals, MSBCA Nos. 3099, 3107, and 3110, which were consolidated by two separate Consolidation Orders dated January 4, 2019 and March 8, 2019. Additionally, in MSBCA Nos. 3107 and 3110, the Board denied preliminary motions to dismiss for lack of standing on January 30, 2019 and March 8, 2019, respectively.

FINDINGS OF FACT

I. THE INVITATION FOR BIDS

Scope of the Contract and Basis of Award

On May 9, 2018, the Department of General Services (“DGS” or “Respondent”) issued Invitation for Bid No. 001IT820838/MDDGS31038816 titled “Statewide Contract for Paint and Paint Products” (“IFB”).² The IFB was for an indefinite quantity contract “to obtain multiple sources of supply for paint, stains, polyurethanes and paint supplies at a percent off catalogue price” for three (3) years, with the State retaining a unilateral right to renew the contract or any part of the contract for two (2) one-year terms. *Appellant’s Ex. #2*, IFB at 4-5, Section A (A. Objective & D. Scope of Contract). The State’s intent was “to award multiple contracts by region and lot, for the supply of paint, paint products, and chemical coatings based on the responses contained herein and on the attached price list, as determined by the Procurement Officer to be in the best interests of the State of Maryland.” *Id.*, Section A (A. Objective).

The following criteria were to be considered in awarding contracts:

B. BASIS OF AWARD

1) The contract is to be awarded to the responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the invitation for bids, and is either the most favorable bid price or the most favorable evaluated bid price. A bid may not be evaluated for any requirement or criterion that is not disclosed in the invitation for bids. (COMAR 21.05.02.13)

2) Multiple award(s) for this solicitation will be made, **by region and LOT**, to the lowest responsive bidder(s) meeting specifications offering the highest “Discount Off of List”, relative to the list price with consideration given to region, retail location(s), competency and responsibility of the bidder, and the ability of the bidder to perform satisfactory service.

² DGS attempted to award this statewide contract for paint and paint supplies multiple times over the last several years. Both SW and DGS have attempted to use various aspects of these prior procurements in support of their arguments in this case. The Board did not find that the facts relating to these prior procurements were relevant to this instant appeal and, accordingly, it sustained timely-made objections relating to them.

3) Future orders from Agencies may be placed with the vendor who has the lowest written Discount Off of List aggregate order quoted price, with consideration given to delivery requirements, at the time of the agency procurement request.

4) Each lot will be evaluated and the **Discount Off of List/Catalog** for the specific Lot will be the determining factor for consideration of award(s).

- A) Group I – Latex, Acrylic Enamel, Acrylic Epoxy, Acrylic Urethane DTM's, or approved equal
- B) Group II – Oil based, Alkyd, Solvent Borne Acrylic, or approved equal
- C) Group III – Zero-VOC Paints after Tinting, or approved equal
- D) Group IV – Stains and Polyurethanes
- E) Group V – Sundries

Appellant's Ex. #3, Addendum #2 at 1 ("Change to Basis for Award")(emphasis in original).

The IFB divided Maryland into five distinct Regions (A through E) and allowed vendors to bid on one or all Regions. The Region at issue in this appeal is Region C (Central, which consists of Baltimore City and Anne Arundel, Baltimore, Carroll, Harford, and Howard Counties. *Appellant's Ex. #2, IFB at 4-5, Section A (C. Method of Bidding)*.³

MBE Goals

The IFB initially set the Certified Minority Business Enterprise ("MBE") participation goal at three percent (3%) of the total contract. By addendum to the IFB, on June 1, 2018, DGS limited the 3% MBE subcontracting goal to Region C only:

MBE INFORMATION – The goal of the State of Maryland's Minority Business Enterprise (MBE) Program is to attempt to provide a fair share of procurement contracts to Certified Minority Business Enterprises. There is a 3% participation for this bid, **FOR REGION C ONLY** (Central: Anne Arundel, Baltimore, Carroll, Harford, Howard Counties & Baltimore City).

³ The IFB further indicated that pursuant to MD. CODE ANN., STATE FIN. & PROC., §13-110 other entities would be allowed to purchase from this contract including, but not limited to certain Counties, Baltimore City, and the Baltimore City Housing Authority, making Region C a particularly lucrative region.

Appellant's Ex. #3, Addendum #2 at 1 (“Change MBE Region Requirement”).

The IFB contained detailed instructions concerning MBE participation and required bidders to accurately complete and submit MBE forms. In compliance with COMAR 21.11.03.12-1, work performed by an MBE can only be counted towards the MBE participation goal if the MBE is performing a commercially useful function on the Contract. *Appellant's Ex. #2, IFB at 24, Attachment A (MBE Attachment D-1A: MBE Utilization and Fair Solicitation Affidavit & MBE Participation Schedule - Instructions - #7)*. The IFB provided that the procurement officer (“PO”) shall deem the bid non-responsive if the bidder fails to accurately complete and submit the MBE Affidavit and Schedule with the bid or proposal as required. *Id.* at 23. This IFB did not contain any Identified Items of Work⁴ for performance by MBEs. It was up to the bidder to reasonably identify sufficient items of work to be performed by MBE firms. *Appellant's Ex. #3, Addendum #2 (MBE Attachment D-1B – Waiver Guidance)*.

Specifications

The IFB required that “[a]ll materials, equipment, supplies or services shall conform to federal and State laws and regulations and to the specifications contained in this solicitation.” *Appellant's Ex. #2, IFB at 8, Section B (#3. Specifications)*. The minimum solid volumes allowed were broken down in great detail by Group/Lot, interior/exterior, and even further by the particular type of paint product. *Id.* at 19, Section C (#13. Paint and Sundries Specifications).

The IFB further contemplated the possibility of deviations from specifications and addressed how they should be dealt with in bids:

⁴ “Identified Items of Work” means the items identified by the procuring agency during the goal setting process and listed as possible items of work for performance by MBE Firms. *See Appellant's Ex. #3, MBE Attachment D-1B, Waiver Guidance, I. Definitions.*

14. QUALITY:

Any deviations from specifications either written or implied by reference to brand indicated must be clearly detailed in writing on a separate sheet. Otherwise, it will be considered that all items offered are in strict compliance with the specifications and the successful bidder will be held responsible for any misrepresentations of products. . . .”

Id. at 21, Section C (#14. Quality).

In addition to meeting minimum solid volumes, the IFB required bidders to provide a warranty that, among other things, required all products to meet federal and State Volatile Organic Compound (“VOC”) regulations:

15. WARRANTY:

The Bidder is to submit with their bid all manufacturer warranties for paint they are bidding under this contract. Such warranties shall prevail only to the extent that they do not conflict with any other bid conditions. All paint bid for this solicitation shall contain no lead or mercury products unless the paint specifications allow for such deviation. All products under this contract shall meet Federal and State VOC regulations.

Id., Section C (#15. Warranty).

II. THE BIDS

DGS opened bids on June 11, 2018. Only SW, The McCormick Paint Works Co., Inc. (“McCormick”), and PPG Architectural Finishes, Inc. (“PPG”) submitted bids covering all five regions.⁵

Sherwin-Williams

Craig Mackay, the SW National Sales Manager for the Americas Group National Account Team in State and Local Government (“MacKay”), was responsible for preparing SW’s

⁵ PPG’s bid requested a waiver from the three percent (3%) MBE participation goal in Region C, but it did not submit any of the required documentation in support of the waiver. The PO determined PPG’s bid in Region C to be non-responsive. PPG has not contested this determination. Accordingly, PPG’s bid, bid evaluation, and award will not be discussed further in this Opinion.

bid. MacKay testified that he has been responding to government bids for 26-27 years. *Transcript 7/31/19* at 23-24. (“Tr. I”). MacKay reviewed the IFB for MBE requirements and determined that it required MBEs to be certified by the Maryland Department of Transportation (“MDOT”). He further indicated that since there were no Identified Items of Work for MBEs in the IFB, it allowed him to cast a wide net, with the only restriction being that the work performed by the MBE be a commercially useful function. *Id.* at 40. He defined a commercially useful function as something that increases the value of the business, increases sales, decreases complaints, assists with customer service, and makes a company more valuable to its shareholders.⁶ *Id.* 38-40.

MacKay printed the complete list of certified MBEs and culled it to remove companies not located in or near Maryland, as well as companies that SW had previously “red-flagged” as credit problems. MacKay then spoke with his local people to determine whether they had prior good working relationships with any of the companies remaining on the list. *Id.* at 26, 39-40. SW ultimately selected Eastwood Painting & Contracting (“Eastwood”), a Hispanic American-owned MBE, to perform three percent (3%) of the total contract value in Region C. The owner of Eastwood is Cynthia Zaffiris (“Zaffiris”).

In choosing an MBE, SW was not interested in having an MBE subcontractor provide warehousing or delivery services. *Id.* at 51. According to MacKay, SW has a company policy that generally requires SW-labeled products be sold and distributed through a SW storeroom. The rationale behind this policy is that paint is an item that requires an additional process at the time of sale, such as tinting. MacKay testified that “paint is not just paint”: there are a lot of technical aspects to which paint is appropriate for a particular situation. *Id.* at 42. MacKay

⁶ The Board disagrees with MacKay’s definition of a commercially useful function. The purpose of the MBE goals is not to increase the sales of the non-MBE prime contractor. This issue will be discussed further *infra*.

further explained that SW has a large footprint in Region C and would likely have a location near any proposed subcontractor. *Id.* at 60. Because a lot of paints are deemed hazardous, SW had liability concerns about having its paints on someone else's trucks. *Id.* at 45.

Instead, SW selected Eastwood and identified the work that Eastwood would perform under two separate North American Industry Classification System ("NAICS") Codes: (1) NAICS Code 611430 – Professional and Management Development Training, and (2) NAICS Code 54611 – Administrative Management and General Management Consulting Services. SW further described Eastwood's scope of work as "paint sales development" and "paint sales management." Eastwood would be charged with developing sales through interaction with State agencies and with maintaining logs of agency contacts and calls. *Appellant's Ex. #9* (MBE Attachment D-3A – MBE Subcontractor Project Participation Certification). MacKay explained that SW planned to create a list of underperforming accounts in Region C and give that list to Eastwood. Eastwood would then contact these customers and create a relationship and sell SW products to those accounts, mainly by answering a variety of technical questions. *Tr. I.* at 57-58. In essence, Eastwood would be acting as a sales and customer service representative.

Zaffiris confirmed that SW wanted Eastwood to contact different agencies and buyers in Region C. In fact, she had started reviewing past State contracts and buyers to collect research about past products and possible improvements she could recommend when contacting the agencies. *Id.* at 150-151. She indicated that when SW approached Eastwood on this IFB, she considered it a way to be mentored by a larger company. *Id.* at 149. Eastwood anticipated creating continuing relationships by making these initial contacts. *Id.* at 151.

During rebuttal testimony, MacKay expanded the scope of Eastwood's responsibilities to include answering technical calls from State agencies that SW claims to regularly receive in Region C. *Transcript 9/11/19* at 96 ("Tr. II").

McCormick

McCormick's bid identified Tegeler Construction & Supply ("Tegeler") as the MBE subcontractor it proposed to use to meet the three percent (3%) MBE participation requirement in Region C. Tegeler would perform work under NAICS Code 424950 (Paint, Varnish, and Supplies Merchant Wholesalers). Tegeler's work was further described as "Sales of paint and paint supply products to end user agencies, Processing of orders placed by end user agencies." *Appellant's Ex. #33* at 28.

III. REVIEW OF THE BIDS

Calvin E. Gladden, II, who is a Program Manager for DGS, was the PO for this IFB. He was responsible for reviewing the bids and ultimately making the recommended awards. George Mitchell ("Mitchell"), the Director of Office and Business Programs at DGS, was also involved with this procurement. On the front end, as part of the Procurement Review Group ("PRG"), his office did assessments for viability of small business, minority and veteran goals. Eventually, at the point of pending award, he reviewed all the submissions for compliance with the MBE goals. *Tr. II* at 9.

Sherwin-Williams' Bid

Because the IFB called for a contract(s) for paint products and supplies, the PO determined that contractors, including MBE subcontractors, must have the ability to warehouse and deliver paint products and supplies to State agencies at fixed discounted prices. The PO reviewed SW's bid and determined that Eastwood would not perform a commercially useful

function under this paint supply contract. He based his determination on the fact that Eastwood's proposed work included paint sales development and management, which he found unnecessary under this IFB for paint and paint supplies. The PO testified that the scope of the Contract drives MBEs' responsibilities. *Tr. I* at 167. According to the PO, this IFB was not seeking a marketing company or subject matter expert on paint and paint supplies because the State has access to its own experts. Rather, the state was seeking a paint distributor. *Id.* at 169. The PO confirmed that at the pre-bid meeting, contractors were told to be creative with MBEs.

Notwithstanding that directive, supply and delivery of paint remained the IFB's primary objective. *Id.* at 164-165.

Even though Mitchell recognized at the outset that the NAICS codes provided for Eastwood were not in the supply realm, were outside the scope of the contract, and would not meet the definition of a commercially useful function, he investigated further and determined that Eastwood was also certified as a wholesaler and regular dealer under NAICS Code 424950. Mitchell took the additional step of having his office follow-up with Eastwood by telephone to ascertain whether there had been an error or mistake with how Eastwood was to be engaged on this contract. He also wanted to confirm whether Eastwood had warehouse space.⁷ *Tr. II* at 42-43.

Zaffiris confirmed that DGS had contacted her and interviewed her in July, 2018. *Tr. I* at 155. She was asked why Eastwood was not getting a warehouse to store paint and a van to do delivery. *Id.* She made it clear to DGS that she would not be storing or warehousing paint. *Id.* at 157. Zaffiris explained that she operates Eastwood out of her home. *Id.* at 152. In fact,

⁷ Mitchell admitted in his testimony that he was not sure whether this MBE issue would be curable, but that he wanted to do his due diligence so he could tell Procurement and Legal what he found out and they could make a final decision. *Id.* at 44-45. As will be addressed in greater detail later in this Opinion, responsiveness must be determined at bid opening, prior to any verification process.

Eastwood recently had NAICS Code 424950 removed from its MBE listing specifically because Eastwood was no longer providing these services to its customers. *Id.* at 153, 156.

Based on his review of SW's bid, the PO sent SW an August 7, 2018 letter advising SW that the portion of its bid relating to Region C was rejected as non-responsive because Eastwood, SW's designated MBE, was not identified to be performing a commercially useful function under COMAR 21.11.03.12-1. *Appellant's Ex. #1* (August 7, 2018 Letter).

McCormick's Bid

MBE Goal

DGS reviewed McCormick's bid, including its MBE documents. McCormick identified Tegeler as the Women-Owned MBE that would be performing three percent (3%) of the total contract in Region C. It further stated that Tegeler would be performing work under NAICS Code 424950 (Paint, Varnish, and Supplies Merchant Wholesalers). The work Tegeler was to perform was further described as "sales of paint and paint supply products to end user agencies" and "processing of orders placed by end user agencies" *Appellant's Ex. #33*. DGS next contacted Tegeler by telephone and confirmed it was, in fact, providing and distributing paint. *Tr. I* at 184. Based on the information contained in McCormick's bid, DGS determined that Tegeler was performing a commercially useful function within the scope of this paint supply and delivery contract, and that McCormick was committing to comply with the MBE Goal in the IFB.

Specifications: Volatile Organic Compounds ("VOCs") and Minimum Solids Requirements

As part of the evaluation process, the PO referred back to the specifications set forth in the IFB to determine whether bidders were in compliance with them. *Id.* at 170-171. Two of the things that the PO looked for in evaluating these bids were compliance with State and federal

regulations regarding VOCs, and compliance with IFB requirements regarding minimum solids volume.

In evaluating McCormick's bid, the PO confirmed that he checked all of the products submitted by McCormick for compliance with State and federal VOC regulations. He determined that all products, as submitted, were compliant.⁸ *Id.* at 173-174.

The PO further determined that some of the products identified by McCormick did not meet the minimum solids volume allowed in the IFB. Nevertheless, McCormick had included conforming products in all the categories. According to the PO:

If the bid allowed for only awarding the compliant item, when (sic) the noncompliant item didn't matter. It's just noise for lack of a better word. I mean, in this instance, McCormick submitted multiple items for a given product group, and they submitted those items because they wanted us to be aware that they had those items even though they knew they weren't compliant. But I dismissed them because they weren't part of the contract requirements.

Id. at 171-172.

McCormick's sheets did not have any markings on them identifying the noncompliant items as alternate products, nor were they identified on a separate sheet pursuant to IFB Section C, #14. The PO stated that he did not consider the noncompliant items and that, as the PO, he retained the right to do what was in the best interest of the State. *Id.* at 173. He

⁸ SW marked for identification, as *Appellant's Ex. #35*, what it claimed were technical data sheets received in response to a Maryland Public Information Act ("MPIA") Request. SW claimed these sheets provided details concerning the chemical properties for products contained in McCormick's bid. *Id.* at 108-109. DGS objected to SW questioning MacKay about McCormick's data sheets to the extent it constituted expert testimony because he was not identified and/or qualified as an expert witness. The objection was sustained. *Id.* at 109-110. The Board later clarified its ruling, stating that it was not interested in expert testimony as to what a VOC is, or what potential harm it causes to people or the environment. It was only concerned with whether the numbers or ranges provided in the IFB and/or via State or federal regulations were complied with in the bid. This was merely a simple comparison of numbers. Although the objection had been sustained, MacKay would be allowed to testify as a fact witness as to whether McCormick's bid satisfied the IFB requirements. This included testifying about factual information included on documents received in response to the MPIA Request (*i.e.*, the technical data sheets). Future objections along this line would be ruled upon as they arose. *Id.* at 113-114. Notwithstanding this clarification, SW never pursued further questioning of MacKay concerning McCormick's technical data sheets, and *Appellant's Ex. #35 for Identification* was never admitted into evidence at the hearing.

confirmed that McCormick was only awarded a contract to supply the conforming products. *Id.* at 176. Ultimately, each responsive contractor would be issued a Blanket Purchase Order (“BPO”), which set forth the volume solid ranges for particular paints as required in the IFB. Agencies could only purchase paints within that range as identified on the BPO. *Id.* at 189-190.

Based on the PO’s evaluation and investigation of McCormick’s bid, he determined that it was responsive and recommended it for award in Region C.

IV. AWARDING OF THE CONTRACTS

The following contract awards were made to SW and McCormick pursuant to a Recommendation for Award dated August 9, 2018: McCormick was awarded Regions A, B, C, D, E and all five product groups; and SW was awarded Regions A, B, D, E, and all five product groups, excluding no-bid items in Group II. SW’s bid in Region C was found to be non-responsive after DGS rejected SW’s MBE subcontractor, Eastwood, for not performing a commercially useful function. In September 2018, DGS issued a BPO to each of the bidders consistent with their respective awards.

V. BID PROTESTS, PO DECISIONS, AND APPEALS

On August 24, 2018, SW filed its first bid protest (“First Protest”) challenging the PO’s determination that SW’s bid was non-responsive to the published MBE bid requirements for Region C. It challenged the PO’s rejection of its proposed MBE, Eastwood, for not performing a commercially useful function. The PO denied the First Protest on September 11, 2018 stating that neither of the NAICS codes provided for Eastwood were required to facilitate an agency’s paint purchase. The PO further concluded that there were other paint, varnish, and supplies MBE merchant wholesalers registered with MDOT that could have been identified and selected.

SW appealed the PO's Final Decision to the Board on September 28, 2018, which was docketed as MSBCA No. 3099.

On October 31, 2018, SW filed its second bid protest ("Second Protest") based on information it discovered through a MPIA Request. SW contended that the MBE qualifications of Tegeler and Eastwood appeared to be substantially similar and, therefore, it was arbitrary and capricious to find McCormick's bid responsive, yet find SW's bid non-responsive. SW requested that McCormick's award be voided and that DGS award the contract to SW. The PO denied the Second Protest on November 27, 2018. He indicated that since the IFB contemplated multiple awards for this contract, DGS had evaluated each bid separately to determine whether a contract should be awarded to any or all bidders. Each bid was evaluated for responsiveness and responsibility. Because there was no request in the IFB for a bidder to provide the services that SW proposed that Eastwood would provide (paint sales management and development), DGS determined that Eastwood was not providing a commercially useful function. Additionally, DGS found that Tegeler was designated and able to perform a commercially useful function under NAICS Code 424950 (paint, varnish, and supplies merchant wholesalers). SW appealed the PO's Final Decision to the Board on December 10, 2018, which was docketed as MSBCA No. 3107.

On December 4, 2018, SW filed its third bid protest ("Third Protest") claiming that it had recently been provided additional documents responsive to its MPIA Request, including McCormick's product information. SW claimed that McCormick's bid was non-responsive and that McCormick was not responsible. SW contended that some of the paints offered by McCormick failed to meet State VOC regulations and that some of its products failed to meet the minimum solids volume allowed under the IFB. The PO denied the Third Protest on December

20, 2018. He found that pursuant to COMAR 26.11.39, there was a VOC-content limit exemption when certain products are sold with a volume of one (1) liter (1.057 quarts) or less. Additionally, he found that there was no reference in the IFB regarding container size requirements. Finally, he determined that in addition to products that McCormick submitted that met bid specifications, it also submitted alternative non-responsive items for informational purposes that were not evaluated or considered for award. SW appealed the PO's Final Decision to the Board on January 4, 2019, which was docketed as MSBCA No. 3110.

The three appeals were consolidated and heard by the Board over two non-consecutive days.

STANDARD OF REVIEW

To prevail on an appeal of the denial of a bid protest, an appellant must show that the agency's action was biased or that the action was "arbitrary, capricious, unreasonable, or in violation of law." *Hunt Reporting Co.*, MSBCA No. 2783 at 6 (2012)(citing *Delmarva Cmty. Servs., Inc.*, MSBCA 2302 at 8 (2002).

DECISION

- I. **First Protest Appeal, Docket No. MSBCA 3099: DGS's determination that SW's bid in Region C was non-responsive was neither biased, nor arbitrary, capricious, unreasonable, or in violation of law.**

SW disagrees with the PO's determination that its bid in Region C is not responsive to the IFB. SW's First Protest is best summarized by the following excerpt from its Notice of Appeal:

SW objects to the finding that it submitted a non-responsive bid, specifically the finding that its designated MBE was not performing a commercially useful function. Rather, SW submitted a responsive bid, and included a proposed affiliation with Eastwood, a certified MBE pursuant to the State of Maryland, whom SW was planning to engage to provide a commercially useful function under

the Contract, which specifically included managing and providing assistance on underperforming State accounts.

9/28/18 Notice of Appeal at 2.

Pursuant to COMAR 21.01.02.01(78), “‘Responsive’ means a bid submitted in response to an invitation for bids that conforms in all material respects to the requirements contained in the invitation for bids.” The Board has addressed when and how responsiveness must be determined on numerous occasions. For example, the Board recently explained that:

It is well-settled law that “responsiveness must be determined at the time of bid opening only on the basis of information set forth on the face of the bid submission.” *Ace Uniform Services, Inc.*, MSBCA No. 3027 (2019) at 21-22; *see, JP Morgan Electronic Financial Services, Inc.*, MSBCA No. 2577 (2007) at 10 (citing *H.A. Harris Co., Inc.*, MSBCA No. 1392 (1988)). A bidder’s responsiveness, or intention to comply with all IFB specifications, must be determined from the face of the bid documents at the time of bid opening and not from information subsequently obtained through a verification process. *Id.* The protestor has the burden to show that the PO’s determination that the bid was responsive was arbitrary, capricious, unreasonable, or unlawful. *Id.*

Associated Building Maintenance Co., Inc., MSBCA No. 3130 (2019) at 10.

Because the responsiveness issue directly arises out of SW’s attempts to meet the MBE participation goal set forth in the IFB, it is important to understand some of the history behind setting MBE participation goals in Maryland. The General Assembly commissioned and then reviewed a study published on February 8, 2017, entitled “Business Disparities in the Maryland Market Area” (“Study”) and set out its legislative findings in MD. CODE ANN., STATE FIN. & PROC. §14-301.1. The Study provided that there was “a strong basis in evidence demonstrating persistent discrimination against minority- and women-owned businesses.” *Id.* The General Assembly found that “notwithstanding the levels of participation achieved when race-conscious measures are used, in the absence of Minority Business Enterprise participation goals for State procurement, there is a substantial decrease in the overall utilization of minority- and women-

owned businesses.” *Id.* Accordingly, Maryland continues to implement and enforce a comprehensive and inclusive MBE Program designed to remedy this discrimination.

Maryland’s Minority Business Enterprise Policies are set forth in COMAR 21.11.03. They are extremely detailed and, as relevant to this First Protest, state that a procurement agency may only count a certified MBE’s participation toward the participation goals if the MBE is performing a commercially useful function. The rationale behind this requirement is that the State wants to ensure that an MBE is not simply being identified as a pass-through entity for receiving payment under a contract, but will actually be performing some portion of the work on the contract and thereby gain experience that can be used to grow its business.

The determination of whether an MBE performs a commercially useful function is governed by COMAR 21.11.03.12-1 (B):

B. Commercially Useful Function. A procurement agency may count participation of a certified MBE contractor toward MBE goals only if the certified MBE is performing a commercially useful function on that contract.

(1) Commercially Useful Function.

(a) A certified MBE performs a commercially useful function when it is responsible:

(i) For execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved; and

(ii) With respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.

(b) To determine whether a certified MBE is performing a commercially useful function, the procurement agency shall evaluate:

(i) The amount of work subcontracted;

(ii) Industry practices;

(iii) Whether the amount the certified MBE is to be paid under the contract is commensurate with the work it is actually performing; and

(iv) Other relevant factors.

- (2) A certified MBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of MBE participation. In deciding whether a certified MBE is such an extra participant, the procurement agency may examine similar transactions, particularly those in which MBEs do not participate.
- (3) A certified MBE is presumed not to perform a commercially useful function if it does not perform or exercise responsibility for at least 30 percent of the total dollar value of its contract with its own work force, or the certified MBE subcontracts a greater portion of the work of a contract than would be expected on the basis of industry practice for the type of work involved. A procurement agency may, however, upon evaluation of the work involved and industry practices, decide that the certified MBE is performing a commercially useful function.

COMAR 21.11.03.12-1(B)(emphasis added). Commercially useful function is further defined in DGS's Minority Business Enterprise Utilization Procedures:

Commercially Useful Function: work performed by an MBE which in light of industry practices and other relevant considerations, **has a necessary and useful role in the transaction** of a kind for which there is a market outside the MBE Program, and is not a superfluous step added in an attempt to obtain credit toward achieving an MBE contract goal(s). Work performed by an MBE in a particular transaction can be counted toward MBE goals only if the Department determines that the MBE has performed a commercially useful function.

See Appellant's Ex. #6 (emphasis added). The Maryland Minority Business Enterprise Program Manual definition further confirms that "[a] certified business is considered to perform a commercially useful function when it is responsible for **the execution of a distinct element of the work of a contract** and carries out its responsibilities by actually performing, managing and supervising the work involved. . . ." (emphasis added).

In setting up the MBE program, the State has gone to great efforts to ensure that the work provided to and performed by MBEs is meaningful and that it will benefit the MBE outside the MBE Program. More importantly, COMAR, as well as both of the manuals quoted above, specifically require that the work performed by the MBE be within the scope of the work on the

contract. They use the following phrases, shown in bold in the quotes above, to express this requirement:

1. "is performing a commercially useful function on that contract"
2. "for execution of work of the contract"
3. "has a necessary and useful role in the transaction"
4. "execution of a distinct element of work of the contract"

In compliance with COMAR 21.11.03.12-1, DGS correctly took the position that a function can only be commercially useful if the function is something considered to be within the scope of this particular contract. *Tr. II* at 22. DGS wanted to make sure that the MBE participation was not "outside of the scope of work." *Id. at 23*. According to the PO, "the MBE should perform in accordance with the terms and conditions of the contract, period. The scope of the contract is what drives the MBE's responsibilities." *Tr. I* at 167.

The objective of this contract was to "obtain multiple sources of supply for paint, stains, polyurethanes and paint supplies at a percent off catalog price." *Appellant's Ex. #2*, IFB at 4. This IFB was not looking for a marketing representative or for someone to provide technical assistance, because the State already has its own subject matter experts who can and do perform these functions. *Tr. I* at 169, 185. This IFB was a pure supply contract with no service component. DGS was looking for a distributor. *Id. at 185*.

Because responsiveness must be determined at bid opening on the face of the bid documents and cannot be based upon information subsequently obtained through a verification process, the question we are faced with is: what information was available to the PO at the time of bid opening to support his determination that Eastwood was not being proposed to perform a commercially useful function under this contract? The answer is found by looking at SW's

MBE Utilization and Fair Solicitation Affidavit & MBE Participation Schedule, and its MBE Subcontractor Project Participation Certification.⁹

SW committed to meet in full the three percent (3%) MBE participation goal in Region C by using Eastwood, a Hispanic American-owned MBE, to perform “paint sales development” and “paint sales management.”¹⁰ *Appellant's Ex. #7* at 26-28. The D-3A further describes the services Eastwood will be performing as “develop sales through interaction with contract agencies” and “maintain logs of agency contacts and calls.” Additionally, it identifies that the work will be performed under NAICS Code 611430 (Professional and Management Development Training) and NAICS Code 541611 (Administrative Management and General Management Consulting Services). *See, Appellant's Ex. #'s 5, 7, & 9.*

DGS indicated that after reviewing Eastwood’s submission, the PO determined that the NAICS Codes provided were not in the supply realm and, in the terms of the scope of this contract, would not meet the definition of a commercially useful function. *Tr. II* at 42. Having made this determination based solely on the review of the documents available at bid opening, DGS nevertheless followed up with Eastwood, and Ms. Zaffiris verified that it would not be warehousing or delivering paint.¹¹

⁹ Which MBE Documents were required to be submitted with the bids in this IFB is a bit confusing, due to language contained on Addendum #2. Specifically, it says to “Add the following section to: Attachment A, MBE Utilization and Fair Solicitation Affidavit & MBE Participation Schedule.” (“D-1A”). Following that language are numerous documents, including MBE Attachment D-3A, the MBE Subcontractor Project Participation Certification (“D-3A”). Notwithstanding the D-3A specifically stating that it is to be returned within 10 days of notification of apparent award, SW submitted the D-3A with its bid. It was included as the second page of its D-1A, between pages 26 and 27. *See Appellant's Ex. #7* to the hearing and *Appellant's Ex. #4* to its Notice of Appeal in MSBCA 3099. Interestingly, neither of those D-3A forms are counter-signed by Eastwood, but contain handwritten language stating “filed under addendum 2.” However, a fully executed D-3A that contained NAICS Codes was admitted as *Appellant's Ex. #9* at the hearing.

¹⁰ SW also incorrectly identifies Eastwood as performing the same work in Section A on page 27, which actually is where a minority prime can set forth work it is self-performing. This issue was not raised by the parties and, therefore, will not be addressed further.

¹¹ As set forth in detail in the Findings of Fact, MacKay confirmed that SW has a policy prohibiting subcontractors from warehousing and delivering its paint and that Eastwood was going to be given a list of underperforming accounts in Region C to “cold call” and try and sell more paint to State agencies. Eastwood would also provide

SW argues that Eastwood would clearly be performing a commercially useful function because it is being proposed to perform work under a NAICS Code for which it has been certified. This argument is flawed because the NAICS Code identified in the bid must be relevant to the scope of work on this particular project. Here DGS determined that paint sales development and management were not within the scope of this paint supply contract.

SW also argues that having Eastwood contact underperforming accounts to try and sell them paint and answer technical questions will increase SW's sales and provide Eastwood with new contacts in the field. This argument fails for the same reason. Although this work may be beneficial to SW's bottom line, and potentially Eastwood's, it does not satisfy the definition of a commercially useful function as set forth in COMAR 21.11.03.12-1B because it is not work requested or required on this paint supply contract.¹² Ironically, SW actually provides a Project Description of "supply paint & paint products" on its D-1A, right before identifying "paint sales development and paint sales management" as the work Eastwood will perform. *Appellant's Ex. #7* at 27-28.

The Board finds that the PO was not biased, and did not act arbitrarily, capriciously, unreasonably, or in violation of law when it denied SW's First Protest. As set forth above, both the facts and law sufficiently support the PO's determination that Eastwood was not being proposed to perform a commercially useful function under this contract, thus making SW's bid in Region C non-responsive.¹³

technical advice by phone. This verification and testimony confirming DGS's determination is not relevant to the responsiveness determination because it was not information available in the documents at bid opening.

¹² Although the Board found Ms. Zaffiris credible and willing to perform the work requested by SW, it wonders how the services ultimately performed by Eastwood would have correlated with payment of three percent (3%) of the total contract in Region C that Eastwood was being guaranteed.

¹³ DGS found SW's bid in Region C non-responsive and rejected it pursuant to COMAR 21.06.02.03 B(2). However, SW's bid arguably could have also been rejected pursuant to COMAR 21.11.03.09 C(5) for failure to accurately complete and submit the MBE utilization affidavit and MBE participation schedule. Although SW completed and submitted the forms, it included areas of work for its MBE on them that were found not to be

II. Second Protest Appeal, Docket No. MSBCA 3107: DGS's determination that McCormick's bid in Region C was responsive to the MBE requirements of the IFB was neither biased, nor arbitrary, capricious, unreasonable or in violation of law.

SW's Second Protest in essence makes a "what's good for the goose should be good for the gander" argument. After receiving McCormick's MBE Utilization and Fair Solicitation Affidavit & MBE Participation Schedule in response to its MPIA request, SW claims that the work descriptions for Eastwood and Tegeler are substantially similar and that it would be arbitrary, capricious, and unreasonable to find SW's bid non-responsive, while at the same time finding McCormick's bid responsive.

As mentioned previously, this IFB anticipated multiple awards so there was no need to compare bids and select one over another. DGS reviewed the bids independently. As set forth above, the Board has already upheld the PO's determination that SW's bid was non-responsive in Region C and need not revisit it in this Second Protest Appeal.

The only remaining issue in this Second Protest concerns the PO's determination that McCormick's bid in Region C was responsive. As we explained *supra*, we look to the face of the bid documents and the information the PO had available to him at bid opening when considering whether a bid is responsive. In the MBE documents submitted with its bid, McCormick committed to meet the three percent (3%) MBE participation goal by using Tegeler, a women-owned MBE, to sell "paint and paint supply products to end user agencies" and to process "orders placed by end user agencies." *Appellant's Ex. #33* at 28. Tegeler was going to be performing under NAICS Code 424950 (Paint, Varnish, and Supplies Merchant Wholesalers).

commercially useful functions on this contract. This analysis would turn on an interpretation of the words "accurately complete." Since the PO never addressed this issue, we will not entertain it either.

Based on this information the PO determined that Tegeler would be providing and distributing paint under the contract, which was well within the scope of work on the contract.¹⁴ *Tr. I* at 184.

Based on DGS's independent review of the MBE documents McCormick submitted with its bid, the PO determined that Tegeler was able to perform a commercially useful function on this paint supply contract (warehousing and delivery) and, therefore, found McCormick's Region C bid responsive. The Board finds that the PO was not biased and did not act in an arbitrary, capricious, unreasonable, or unlawful manner in denying SW's Second Protest.

III. Third Protest Appeal, Docket No. MSBCA 3110: DGS's determination that McCormick was a responsible bidder and that its bid in Region C was responsive to the paint specifications in the IFB was neither biased, nor arbitrary, capricious, unreasonable or in violation of law.

Responsibility

SW alleged that McCormick was not a responsible bidder in its Third Protest because its bid contained noncompliant paint products.¹⁵ *Notice of Appeal 1/4/19* at 4. Pursuant to COMAR 21.01.02.01(77), "Responsible' means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance." SW provided no evidence to support its allegation that McCormick was not a responsible bidder, thus, the Board finds that the PO was not biased and did not act in an arbitrary, capricious, unreasonable, or unlawful manner in denying this portion of SW's Third Protest.

¹⁴ DGS also contacted Tegeler by telephone after bid opening and Tegeler confirmed it had a warehouse and was going to be providing and distributing paint under the contract. Although information received as part of a confirmation process is not allowed to be used in making a responsiveness determination, it does provide after the fact support for DGS's determination at bid opening.

¹⁵ This is the same argument SW used in the Third Protest for claiming that McCormick's bid was non-responsive. Responsiveness and Responsibility are not interchangeable terms and accordingly are being addressed separately.

Responsiveness

SW challenged the responsiveness of McCormick's bid alleging that several of McCormick's products failed to meet the minimum standards set forth in the IFB or were not in compliance with Maryland law. More specifically, SW contended that some of McCormick's products failed to meet the VOC-content requirements mandated by law and that others failed to meet the minimum solids volume prescribed in the IFB.

VOC Content

SW produced no evidence that any products submitted in McCormick's bid violated State or federal regulations or laws relating to VOCs. SW's first unsuccessful attempt to address this issue at the hearing through the testimony of MacKay was addressed in detail in Note 8, *supra*. This exchange resulted in no admissible evidence relevant to this issue.

SW next tried to address the VOC issue through the testimony of the PO, but he confirmed that McCormick's products did meet the VOC regulations:

Q. Did you check to see if all the products that McCormick submitted if they actually did meet federal and state VOC regulations?

A. Yes.

Q. You checked that?

A. Yes.

Q. And they did?

A. Yes.

Q. Okay. So that means basically our research is incorrect is what you are finding?

A. I can only tell you that I evaluated the bid, McCormick's response, and they were compliant. I can't speak to your –

CHAIRMAN BEAM: Research, I think is the word she used.

Tr. I at 173-174. SW produced no evidence to contradict this testimony.¹⁶ Accordingly, the Board finds that the PO's decision on this issue was not biased, arbitrary, capricious, unreasonable, or in violation of law.

Minimum Solids Volume Allowed

It is undisputed that McCormick submitted some products in its bid that did not meet the minimum solids volume set forth in the IFB, and that it did not clearly identify these non-conforming products on a separate sheet as required in IFB, Section C, #14. However, it is also undisputed that McCormick provided conforming products in each product group. Accordingly, the final issue in the Third Protest comes down to whether the PO had the discretion to disregard the non-conforming products included in McCormick's bid.

In its Post-Hearing Brief, counsel for DGS took the position that the PO had broad discretion to ignore the non-conforming products and treat them as alternate products, and then went into great detail attempting to support its position by referencing provisions both in COMAR and in the IFB relating to multiple or alternate bids. *See* COMAR 21.05.02.21 and IFB, Section B, ¶35. "Alternate Bid means a dollar amount to be added to or subtracted from the bid for a variation in the item being bid upon. Alternate bids may be either 'add alternate bids' or deduct alternate bids.'" COMAR 21.01.02.01B(1). McCormick's submission of both conforming and non-conforming products in the same bid is clearly not covered under this definition of alternate bids.¹⁷

¹⁶ SW also argued that McCormick attempted to game the system by bidding certain products in quantities smaller than gallons, as the restrictions in COMAR 26.11.39.01B do not apply to products sold in containers with a volume of one (1) liter or less. DGS pointed out in its PO's Final Decision that there is no restriction in the IFB concerning container size requirements. There was no contradictory evidence presented at the hearing.

¹⁷ Although multiple bids is not defined in COMAR, under any plain meaning it requires two or more bids, which again is not the situation with McCormick's bid. *See also, CTC Machine & Supply Corporation*, MSBCA No. 1049 (1982) at 5 (distinguishing between alternate and multiple bids).

In its Post Hearing Brief, counsel for SW acknowledged that COMAR sets forth a process for POs to deal with minor irregularities in bids. However, SW argued that McCormick's submission of non-conforming products was a material deviation and thus not something the PO could waive as a minor irregularity. The Board disagrees.¹⁸

COMAR 21.06.02.04 specifically addresses minor irregularities in bids and proposals. It defines what constitutes a minor irregularity and provides options for how a PO can deal with one:

A. A minor irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors.

B. The defect or variation in the bid or proposal is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the procurement.

C. The procurement officer shall either give the bidder or offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or proposal or waive the deficiency, whichever is to the advantage of the State.

COMAR 21.05.02.12 also addresses mistakes in bids, including how to deal with technicalities or minor irregularities once the PO makes a determination that one exists. Generally, the PO may either give a bidder an opportunity to cure any deficiency resulting from the minor irregularity or it may waive the deficiency if it is in the State's best interest to do so. *Id.* at §A.

SW contends that the PO could not reasonably find that the failure to meet the solids limits are minor irregularities because the non-conforming paints violate the express limits set forth in the IFB. *Appellant's Ex. #2*, IFB at 19 (minimum solids volume allowed). SW claims

¹⁸ DGS's Post-Trial Brief never specifically addressed the minor irregularity issue. Additionally, the PO never used the term "minor irregularity" in his decision or in his testimony at trial. However, as will be discussed hereafter, the analysis performed by the PO, as confirmed by his testimony, is consistent with the finding and waiver of a minor irregularity.

the PO does not have the discretion to waive such a material deviation. This argument misses the mark.

The PO was not waiving product conformity with the specifications because the specifications already allowed for the identification of non-conforming products. He merely waived the requirement that any deviations from specifications be clearly detailed in writing on a separate sheet. *Id.* at 21 (#14- Quality). Additionally, the IFB specifically contemplates moving forward with contract award even if a bidder fails to make these required identifications. The IFB provides that all items identified will be considered to be in strict compliance with the specifications in the IFB and that the bidder will be held responsible for any misrepresentations of products. *Id.* Most importantly, the IFB does not state that failure to detail deviations on a separate sheet will result in the bid being found non-responsive.

Where there is no express language requiring the PO to reject the bid for failure to comply with the bid preparation directions, the PO has discretion to consider whether the irregularity is minor and thus waivable, or material and thus fatal to the responsiveness determination. *Calvert General Contractors Corp.*, MSBCA No. 1314 (1986) at 12. *See also, Wolfe Brothers, Inc.*, MSBCA No. 1141 (1983)(stating that failure to initial bid alterations as instructed by Contract General Provision 2.06 held to be minor irregularity and waivable as there was no express language in solicitation that PO must reject as non-responsive for failure to follow instructions.). This Board has repeatedly held that it will not substitute its judgment for that of the PO absent evidence that the PO acted arbitrarily, capriciously, unreasonably, or in violation of law. *See, Facchina-Trumbull-Skanska JV*, MSBCA No. 2630 (2009).

The PO testified:

If the bid allowed for only awarding the compliant item, when (sic) the noncompliant item didn't matter. It's just noise for lack of a better word. I mean

in this instance, McCormick submitted multiple items for a given product group, and they submitted those items because they wanted us to be aware that they had those items even though they knew they weren't compliant. But I dismissed them because they weren't part of the contract requirements.

Tr. I at 171-172. He testified that he was aware of the language in IFB Section C, #14 and that he believed he held McCormick to the specifications. *Id.* at 172-173. He claimed that as the PO he retained the right to do what was in the best interest of the State, and he believed he did that by exercising his discretion to not consider those noncompliant items. *Id.* at 173. Finally, the PO confirmed that only responsive products meeting the IFB's specifications were included as part of the contract in the form of a blanket purchase order. *Id.* at 189-190.

The PO determined that the non-compliant products were "just noise" and treated them like minor irregularities in the bid documents. As such, he concluded that it was in the best interest of the State to exercise his discretion to "dismiss them" or waive the minor irregularity and find McCormick's bid to be responsive. Finally, the waiver was not prejudicial to other bidders because the noncompliant products were not awarded. Additionally, each bid was considered separately and the IFB allowed for multiple awards.

Accordingly, for the reasons set forth herein, the Board holds that the PO's decision to disregard the noncompliant items and find McCormick's bid responsive was not biased, arbitrary, capricious, unreasonable, or in violation of law.

ORDER

For the foregoing reasons, it is this 18th day of November 2019, hereby:

ORDERED that Appellant's Consolidated Appeals are DENIED; and it is further

ORDERED that a copy of any papers filed by any party in a subsequent action for

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing contested cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner;
or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA Nos. 3099, 3107, and 3110, Appeals of The Sherwin-Williams Company, under Maryland Department of General Services Solicitation No. 001IT820838.

Dated: November 18, 2019

/s/
Ruth W. Foy
Deputy Clerk